**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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| **JOHN DOE,** | : | |
| | : | **Civil Action No: 1:19-cv-11626-DPW** |
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| **Plaintiff,** | : | ***SEALED*** |
| | : | |
| | : | |
| **-against-** | : | |
| | : | |
| | : | |
| **TRUSTEES OF BOSTON COLLEGE,** | : | |
| | : | |
| | : | |
| **Defendants.** | : | |

**PLAINTIFF JOHN DOE'S REPLY BRIEF IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION**

Plaintiff John Doe submits this reply brief in support of his Motion for a Temporary Restraining Order and a Preliminary Injunction.

Defendants frame Plaintiff's request for injunctive relief as a "mandatory injunction," which imposes a higher burden on Plaintiff and demands an "elevated" review. As the Court in *Braintree Labs* explained however, the exigencies of the situation "should still be measured according to the same four-factor test, as the focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.'" *Braintree Labs., Inc. v. Citigroup Glob. Markets Inc.*, 622 F.3d 36, 41 (1st Cir. 2010) (internal citations omitted). Accordingly, even if the Court deems the relief requested in John Doe's motion as a "mandatory injunction," the exigencies, as outlined in Doe's moving brief and Doe's Declaration in support of his moving brief and as further described below, warrant entry of a preliminary injunction in this matter.

## I. Doe has Demonstrated a Likelihood of Success on the Merits.

### A. Breach of Contract

Plaintiff has demonstrated a likelihood of success on the merits of his breach of contract claim, satisfying the first factor of the preliminary injunction analysis. The First Circuit's decision in *Doe v. Trustees of Boston College* (892 F.3d 67 (1st Cir. 2018)) did not overturn the determination in *Doe v. Brandeis* (177 F.Supp. 3d 561 (D. Mass. 2016)) that institutions are required to afford basic fairness in their disciplinary proceedings. Instead, it clarified that, when a school's policies expressly provide for "basic fairness," the Court's evaluation as to whether the school complied with this obligation is based on the university's adherence to its express contractual promises. Here, Boston College deprived Doe of basic fairness when it violated several provisions of its contract with Plaintiff.

#### *1) Violation of fundamental fairness*

Boston College's Code of Student Conduct expressly provides that "The student conduct system exists to protect the rights of the Boston College community and assure fundamental fairness to the complainant and to the respondent." In his moving brief, Plaintiff articulates how BC deprived Doe of fundamental fairness in the investigatory process when it: (i) deprived Doe of proper notice of the charges; (ii) did not provide him an opportunity to confront or cross-examine his accuser or witnesses; (iii) denied Doe access to all evidence until after he had already been interviewed; (iv) deprived him of an effective appeal; and (v) failed to ensure an independent investigation process when it permitted two individuals to serve in the roles of investigator and adjudicator.

***a. Failure to provide proper notice of the charges.***

With respect to BC's failure to provide Doe proper notice of the charges, contrary to Defendants' assertion, Doe articulates precisely what evidence he would have offered, had he been properly notified of the charges against him. Specifically, had Doe been made aware, prior to appearing for an interview and formulating his defense to the charges, that the central issue in dispute concerned not whether Roe was *unable* to consent due to alcohol incapacitation but instead, whether or not she consented to the activity, he would have taken a different approach to his defense.

BC's Policies define "Incapacitation" as follows:

> Incapacitation is the inability to make informed, rational judgments and decisions. If alcohol or drugs are involved, incapacitation may be assessed by evaluating how the substance has affected a person's decision-making capacity, awareness, and ability to make informed judgments. The impact of alcohol and drugs varies from person to person; however, warning signs of possible incapacitation include slurred speech, unsteady gait, impaired coordination, inability to perform personal tasks such as undressing, inability to maintain eye contact, vomiting, and emotional volatility. The perspective of a reasonable person will be considered in the University's determination of whether a person knew, or reasonably should have known under the circumstances, whether the other party was incapacitated. Being intoxicated or incapacitated does not diminish one's responsibility to obtain consent and will not be an excuse for sexual misconduct.

Accordingly, much of Doe's defense focused on the lack of "warning signs" exhibited by Roe during their interactions. On the other hand, Consent is defined as follows:

> Consent is the clear and voluntary agreement to engage in particular sexual activity, communicated through mutually understandable words or actions. Consent is always freely informed and actively given. Silence or lack of resistance cannot be assumed to imply consent. Consent must be ongoing, and it may be withdrawn at any time. consent for one sexual act does not imply consent for any subsequent sexual activity. Consent may never be obtained through use of coercion, intimidation, force, or threats. **Consent cannot be obtained from an individual who is incapable of giving consent because the person…is incapacitated, including through the consumption of alcohol or drugs.**

In their Final Report of June 11, 2019, the Investigators concluded that "it was more likely than not that [Doe] neither knew, nor reasonably should have known, that [Roe] was incapacitated by alcohol…" Yet, they next "separately considered whether, despite her state of incapacitation, [Roe] conveyed consent, as that term is defined by the Policy, to [Doe], to engage in sexual activity with him." Doe was never notified that this "separate consideration" was being pursued. In fact, he was not made aware that such a secondary deliberation had taken place until he received the resolution letter on June 18, 2019.

Defending against the charge that Roe was *incapable* of consenting to any sexual activity is entirely different than defending against a charge that Roe was able to consent but did not do so during her encounter with Doe. By pursuing a violation of the non-consent policy after concluding that Doe was not responsible for a violation of the policy on incapacitation was akin to finding Doe responsible for a criminal charge with different *mens rea* requirements. BC's incapacitation charge is similar to the criminal charge of statutory rape. (MGL. c. 265, § 23). No matter how consensual a 15-year-old says the sexual intercourse was, that 15-year-old simply cannot legally give consent. Similarly, if the Complainant was "incapacitated" she could not, under BC's policy consent to sexual activity, no matter what she said or did during the encounter which demonstrated her consent. Had Doe been notified that he was also being investigated for failing to obtain consent, rather than whether he should have known that Roe was incapacitated and therefore unable to consent according to BC's policies, he would have focused on the specific words and actions that demonstrated she was an active and willing participant and that every action was consensual. BC's speculative defense that the evidence presented by Doe would not have changed even if he had been notified of the exact charges against him does not absolve the College of its obligation to provide proper notice, as required for a fair process. Moreover, contained within BC's Notice to

Appear, the College made it perfectly clear that "if during the investigation there are additional allegations, we would provide an updated notice to you."

***b. Lack of opportunity for cross-examination or confrontation of witnesses.***

Defendants cite to *Haidak v. University of Massachusetts at Amherst* in support of their proposition that even a public institution need not conduct a hearing which includes the right to confront or cross-examine witnesses. However, in the appeal decision issued by the First Circuit on August 6, 2019, the Court held that "due process in the university disciplinary setting requires some opportunity for real-time cross-examination, even if only through a hearing panel." *Haidak v. Univ. of Massachusetts-Amherst,* No. 18-1248, 2019 WL 3561802, at *9 (1st Cir. Aug. 6, 2019). Doe was afforded no such opportunity during BC's investigation. Notably absent from BC's response is a discussion of the holding in *Doe v. Allee* (30 Cal. App. 5th 1036, 1061, 242 Cal. Rptr. 3d 109, 130 (Ct. App. 2019)), where the Court affirmed that "[f]or practical purposes, common law requirements for a fair disciplinary hearing **at a private university mirror the due process protections at public universities**." (Emphasis added). Accordingly, "when a private university student faces serious discipline for alleged sexual misconduct, and the credibility of witnesses is central to the adjudication of the charge, fundamental fairness requires that the university must at least permit cross-examination of adverse witnesses at a hearing in which the witnesses appear in person or by some other means…before one or more neutral adjudicators with the power independently to judge credibility and find facts." *Id.*

Whether this questioning of witnesses should be conducted by the students themselves, or by the institution, remains unclear in light of *Haidak*. However, at a minimum, the First Circuit has declared that "[w]hen a school reserves to itself the right to examine the witnesses, it also assumes for itself the responsibility to conduct reasonably adequate questioning. A school cannot

both tell the student to forgo direct inquiry and then fail to reasonably probe the testimony tendered against that student." *Haidak v. Univ. of Massachusetts-Amherst*, No. 18-1248, 2019 WL 3561802, at *9 (1st Cir. Aug. 6, 2019). Here, Plaintiff has demonstrated that the Investigators failed to reasonably probe Jane Roe when they did not question her allegations of non-consent in light of the undisputed evidence: (i) she consented to the removal of her shorts and assisted Doe in doing so; (ii) Roe stated "I know you want to do it"; (iii) Roe asked Doe to get a condom; (iv) Roe held her underwear to the side and told him to "Do it"; (v) Roe gave verbal instructions during the penetration, such as "go slow" and "hold it there"; and (vi) Roe agreed to switch positions, then turned over onto her stomach.

BC's claim that Doe nonetheless was afforded a "fair substitute for cross-examination" is unavailing. Though he appeared for "several long interviews with the investigator," such interviews did not provide Doe an opportunity to "tell his side of the story." Instead, they were inquisitions, based on information collected from the complainant and other witnesses, which he was not permitted to review until the investigation process was concluded. At no time prior to his interviews was he permitted to review the complaint filed against him, the summaries of witness interviews, or the evidence collected, nor was he permitted to direct questions to be asked of Roe.

Further, BC misrepresents that Doe was permitted to review all evidence prior to the issuance of the responsibility decision. To the contrary, the Investigators changed critical facts in their Final Report, which Doe was never permitted to review or respond to prior to receipt of the decision, including but not limited to the following: (i) the Investigators changed the tense of a text message Roe sent to a friend the morning after the encounter wherein she conceded that the encounter was consensual, from "it was fine" to "it's fine," adopting Roe's revisionist explanation that she meant to state "it's fine," as a way to suppress something that was bothering her; and (ii)

the Investigators disregarded Doe's testimony that he only penetrated Roe after she instructed him to "do it" and held her underwear to the side, a critical factor establishing her consent. Though Doe's testimony was confirmed by his attorney advisor's contemporaneous notes, the Investigators concluded that his attorney misinterpreted their question, disregarded Doe's recollection, and concluded that Doe never provided this information in recounting the interaction.

***c. Use of the inherently biased investigative model.***

BC's use of the investigative model also deprived Doe of fundamental fairness, in violation of BC's express contractual promise. Notably, BC glosses over the fact that students accused of non-sexual-misconduct-related disciplinary matters are afforded a live hearing before a hearing panel, with an opportunity to submit questions for the accuser and witnesses, procedural protections that a respondent in a Title IX case is not provided at BC. While the use of the investigative model, on its own, may not equate to a fundamentally unfair proceeding, when combined with the other factors described herein, Doe was substantially prejudiced in his ability to defend himself.

***d. Lack of a meaningful appeal.***

Finally, BC failed to provide Doe a meaningful opportunity to appeal when it limited the grounds for appeal to two procedural grounds, precluding him from challenging the factual findings. Moreover, the second ground raised in Doe's appeal was inappropriately dismissed by the College. Vice President for Student Affairs Joy Moore declined to consider the material information provided by Roommate 1 after the investigation process concluded as "new evidence" on the grounds that such information was "available" when Roommate 1 was interviewed. BC's policies state in part: "an appeal will be accepted in circumstances where the student is able to provide relevant testimony or other evidence that (i) was unavailable to ***the student submitting the appeal***

at the time of the adjudication process.…" Thus, in denying the appeal on this ground, BC mistakenly concluded that "whatever information [the witness] now claims to have obviously was 'available' when he was interviewed." This information was *not* available to Doe, the student who submitted the appeal, until after the findings were issued on June 18, 2019. Further, in failing to pursue this material information, BC unfairly penalized Doe for failing to obtain information from a witness, a task that was undeniably within the exclusive role of the Investigators. Accordingly, BC violated its own policy and deprived Doe of a fair proceeding when it erroneously denied his appeal on this ground.

***2) Failure to Conduct a Thorough Investigation or Apply the Correct Standard of Review.***

Doe does not merely take issue with the credibility assessments made by the Investigators. Further, he demonstrates the various inconsistencies in Roe's account, and specific conduct demonstrating consent, which directly refute the allegations against him, and which would have been apparent to any investigator reasonably trained in investigative techniques and the applicable preponderance of the evidence standard. While Roe consenting to the removal of her shorts may not, on its own, equate to consent for penetration, Roe's stating "I know you want to do it" in reference to sexual intercourse, asking Doe to get a condom, holding her underwear to the side and instructing Doe to "Do it," giving Doe verbal instructions during the penetration, such as "go slow" and "hold it there," and agreeing to switch positions, in the aggregate, certainly meets the definition of consent per BC's policies, defined as "clear and voluntary agreement to engage in particular sexual activity, communicated through mutually understandable words or actions."

***3) Violation of Confidentiality***

Defendants attempt to circumvent BC's policies concerning confidentiality by contending that Doe was not entitled to confidentiality where a formal complaint had not yet been filed at the

time of Roe's disclosure to Doe's [redacted]. This argument ignores that Roe reported the alleged incident to Senior Associate [redacted], who accompanied her to the meeting with Doe's [redacted], sometime between November 4 and November 7, 2018. It was apparent that Roe intended to pursue a complaint against Doe at that time and thus, she should have been bound by confidentiality. The suggestion that this disclosure was justified because Roe sought to "educate and prevent reoccurrence" is irrelevant; it was not Roe's responsibility to educate an [redacted] about consent, nor is this listed as a carve out to BC's policy on confidentiality.

**B. Title IX**

In arguing Plaintiff is unlikely to succeed on the merits of his Title IX-Erroneous Outcome claim, Defendants miss the forest for the trees. Doe satisfies the first prong of the *Yusuf* standard by demonstrating not only a plethora of procedural irregularities that cast doubt on the ultimate findings, but also by pointing to the specific evidence establishing his innocence. This evidence includes, *inter alia*:

a) The Investigators overlooked the unambiguous evidence that Roe consented to sexual intercourse with Doe: (i) she consented to the removal of her shorts and assisted Doe in doing so; (ii) Roe stated "I know you want to do it"; (iii) Roe asked Doe to get a condom; (iv) Roe held her underwear to the side and told him to "Do it"; (v) Roe gave verbal instructions during the penetration, such as "go slow" and "hold it there"; and (vi) Roe agreed to switch positions, then turned over onto her stomach.

b) The Investigators disregarded a text message Roe sent to her friend the morning after the encounter wherein she conceded that the encounter was consensual, stating: "it was fine." Instead, they adopted Roe's revisionist explanation that she meant to state "it's fine," as a way to suppress something that was bothering her. Though the entire text exchange was in the past tense, the Investigators nonetheless accepted this change, without taking into account the full context and tense of the exchange, where Roe herself confirmed: "and then he started to and it was fine."

c) While concluding that Roe was highly intoxicated to the point of being unable to make informed, rational judgments and decisions (citing in the Report to 22 distinct reasons

why the Investigators believe she was incapacitated) the Investigators nonetheless credit her account as being more reliable than Doe's.

d) In her first interview, Roe disputed that she consented to any aspect of the sexual encounter. Yet, in her second interview, she conceded that she agreed to go into Doe's room, consented to "making out" with Doe, that she "probably" instructed Doe to kiss her neck, that she recalled a conversation about a condom, and that she "did lift up her back so that he could pull her shorts off," all of which corroborated Doe's account. These significant inconsistencies in Roe's statements were never considered by the Investigators when assessing her credibility, nor when considering the credibility of Doe, whose statements in fact aligned with Roe's revised narrative.

Each of the foregoing is sufficient to satisfy the first prong of the erroneous outcome analysis.

With respect to the second element, Doe sufficiently pleads a connection between the erroneous outcome and gender bias, which would permit a reasonable jury to find in his favor. Ironically, in alleging Plaintiff's allegations of bias are conclusory, BC presents generalized case law while failing to address the specific factual points raised in Plaintiff's complaint and moving brief that demonstrate how gender bias was a motivating factor in its decision finding Doe responsible for a policy violation. These circumstances include, *inter alia,*

a) Upon concluding that the evidence did not support a finding of the violation with which Doe was initially charged (non-consensual sexual contact due to incapacitation), the Investigators unilaterally changed the charge against Doe, after the investigation had been concluded, without providing advance notice of this new charge, or allowing Doe an opportunity to contest it before a final decision was issued, in order to ensure that some finding of responsibility was reached, and some sanction imposed against Doe, a male athlete.

b) The Investigators disregarded the clear indications of consent expressed by Roe on the grounds that Doe failed to essentially cross-examine Roe on these particular points during their conversation of December 7 (4 weeks after the encounter, and after Roe's report had been filed), a practice that BC's own policies prohibit.

c) The Investigators deemed Roe's recollection of the events more credible than Doe's, while simultaneously concluding that Roe was highly intoxicated to the point of being unable to make informed, rational judgments and decisions.

d) While the Investigators discussed Roe's demeanor when speaking with her roommates about the alleged incident, they excluded information concerning Doe's reaction to learning of these false charges; i.e. being shocked, scared, upset, and appearing as

> though he was going to vomit. There is no explanation for this disparate treatment of the parties that does not involve bias.

Based on the foregoing, Plaintiff is likely to succeed on the merits of his Title IX claim.

**C. Negligence**

Once again, Defendants make sweeping allegations that Plaintiff has failed to allege specific facts demonstrating his entitlement to relief. To the contrary, Doe explicitly alleges that the Investigators assigned to his case were incompetent, as evidenced by the fact that, upon discovering that the evidence did not support a finding of a policy violation, the Investigators decided to change the charge against Doe after the investigation had been concluded, without providing advance notice of this new charge, or allowing Doe an opportunity to contest it before issuing a final decision. BC was made aware of this inappropriate action when Doe raised the issue in his appeal dated June 27, 2019. Yet, no action was taken in response.

## II. Doe has Demonstrated he will Suffer Irreparable Harm if the Preliminary Injunction is not granted.

In contending Plaintiff will not suffer irreparable harm, Defendants disregard the specific nature of the damages Plaintiff will suffer, as an [redacted]. The likely harm is not limited to merely a one-year delay in his graduation date, or the potential loss of [redacted]. Instead, a one-year suspension, in conjunction with being labeled a sexual assaulter, will affect Plaintiff's ability to pursue a career in his chosen field entirely. Absent injunctive relief, Doe will most likely never have the opportunity to [redacted], as he would become [redacted] disciplinary record.

The contention that "there is no evidence that a gap year in his education will cause him harm in the form of stigma or inability to pursue a career…nor is there any evidence that a person whose disciplinary finding is vacated will suffer stigma from having to explain that he was suspended but later vindicated" has been widely debunked by the Courts. As explained by the court in *King v. DePauw University:*

> The Court finds it inevitable that [Plaintiff] would be asked to explain either situation by future employers or graduate school admissions committees, which would require him to reveal that he was found guilty of sexual misconduct by DePauw. Successfully seeing this lawsuit to its conclusion could not erase the gap or the transfer; the question will still be raised, and any explanation is unlikely to fully erase the stigma associated with such a finding. Money damages would not provide an adequate remedy at that point; DePauw's disciplinary finding—even if determined to have been arbitrary or made in bad faith—would continue to affect him in a very concrete way, likely for years to come.

2014 WL 4197507, at *13 (S.D. Ind. Aug. 22, 2014). *See also Doe v. Middlebury College*, 2015 WL 5488109, at *3 (D. Vt. Sept. 16, 2015) ("[m]oney damages cannot provide an adequate remedy for such imminent and non-speculative harm."); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 601 (D. Mass. 2016) ("A finding of responsibility for sexual misconduct can also have significant consequences off-campus. Post-graduate educational and employment opportunities may require disclosure of disciplinary actions taken by a student's former educational institution."); *Doe v. Univ. of Notre Dame*, 2017 WL 1836939, at *12 (N.D. Ind. May 8, 2017), *vacated*,[1] No. 3:17CV298-PPS/MGG, 2017 WL 7661416 (N.D. Ind. Dec. 27, 2017), citing to *Doe v. Middlebury*, ("While Plaintiff may recover money damages to compensate for lost wages, money damages cannot compensate for the loss of his senior year in college with his class, the delay in the

[1] *Doe v. University of Notre Dame* (2017 WL 7661416, at *1 (N.D. Ind. Dec. 27, 2017)) was vacated by the parties, per a joint stipulation of dismissal, due to a settlement having been reached.

completion of his degree, or the opportunity to begin his career.... Further, Plaintiff would have to explain, for the remainder of his [redacted] life, why his education either ceased prior to completion or contains a gap."); [redacted].

Beyond the harm Doe will suffer if his college education is delayed by one year, he will also suffer irreparable, non-speculative, harm with respect to his [redacted] career. The cases relied upon by Defendants are inapposite; none of those matters discuss the particular impact of a disciplinary suspension on a [redacted]. The likely damage to Plaintiff in this matter, should injunctive relief not be granted, is clearly distinguishable from the potential harm suffered by a [redacted] that is prohibited from [redacted] in an [redacted], as was the case in [redacted]. [redacted] is likewise distinguishable as the Plaintiff in that case did not allege that the disciplinary expulsion would prevent him from pursuing a [redacted] career; instead, he argued he would "[lose] the [redacted], including the joy of [redacted], the [redacted], and the ability to [redacted] and [redacted]." ([redacted]). Moreover, in denying Plaintiff's motion for a preliminary injunction, the Court in *Doe v. Trustees of Dartmouth College* only addressed the plaintiff's likelihood of success on his claims; it did not reach any inquiry concerning Plaintiff's irreparable harm argument, as Defendants' counsel is well aware, having represented Dartmouth College in that matter.

Contrary to the cases relied upon by Defendants, Doe's contemplated harms are not compensable with money damages. In the specific case of college [redacted], "[c]ourts have

consistently held that, given the [redacted], plaintiffs will suffer irreparable harm by losing the [redacted] of choice on a continuous and uninterrupted basis." [redacted]); *see also* [redacted]) ("[redacted]. It is difficult to imagine how a court could quantify these losses in financial terms."); [redacted]. The Court stated: "It would be difficult indeed to measure the loss to the plaintiff in terms of dollars and cents. The injury is substantial and not really capable of an accurate monetary prediction."); [redacted]).

[redacted]

Plaintiff John Doe's damages are far from speculative, as demonstrated by the facts presented in his Declaration and as will be further established at oral argument before this Court. Plaintiff has therefore established the irreparable harm he will suffer, absent injunctive relief.

**III. The Balance of Hardships and the Public Interest Tip in Plaintiff's Favor.**

While BC certainly has an interest in enforcing its student conduct policies, the more substantial interest is in assuring the public that BC carries out such policies in a fair and equitable manner. Though Roe remains enrolled at the College, BC fails to acknowledge that Doe remained on campus for the duration of the investigative process which spanned from approximately December 2018 through June 2019. The only restriction placed on Doe was a mutual Stay Away Order, which he adhered to at all times. There is no reason such an Order could not continue to be enforced for the remainder of Doe's and Roe's time at the College. Beyond BC's concern that the granting of injunctive relief would assure "would-be-complainants" that their complaints will be "snubbed," or give the impression that BC views college [redacted] as more important than the rights of victims, it should be equally concerned with the public interest in assuring that accused students are afforded a fair process, and one that leads to a correct finding.

**CONCLUSION**

For the reasons stated above, the Court should grant Plaintiff's motion for a temporary restraining order and preliminary injunction.

**Dated: Boston, Massachusetts**
**August 14, 2019**

**Respectfully submitted,**

**NESENOFF & MILTENBERG, LLP**
***Attorneys for Plaintiff John Doe***

**By:** */s/ Tara J. Davis*
**Tara J. Davis, Esq. (BBO # 675346)**
**101 Federal Street, 19th Floor**
**Boston, MA 02110**
**(617) 209-2188**
**tdavis@nmllplaw.com**

**Andrew T. Miltenberg, Esq. (*pro hac vice* pending)**
**Stuart Bernstein, Esq. (*pro hac vice* pending)**
**363 Seventh Avenue, 5th Floor**
**New York, New York 10001**
**(212) 736-4500**
**amiltenberg@nmllplaw.com**
**sbernstein@nmllplaw.com**

**CERTIFICATE OF SERVICE**

I, Tara J. Davis, hereby certify that on this 14th day of August, 2019, a true copy of the foregoing was filed through electronic mail to all counsel, due to the sealed designation of this matter.

*/s/ Tara J. Davis*
Tara J. Davis, Esq.